

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

RSA.No. 534 of 2007(E)

AS.19/2005 of DISTRICT COURT, KOTTAYAM
OS.289/2002 of MUNSIF COURT, ETTUMANOOR
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APPELLANT/APPELLANT/PLAINTIFF

M.V.BABURAJ,S/O.LATE VARKEY,
AGED 80 YEARS,MUNDUVELIPARAMBIL,
PADINJATTUMBHAGAM KARA, ATHIRAMPUZHA.P.O,
KOTTAYAM TALUK.

BY ADV. SRI.M.NARENDRA KUMAR

RESPONDENTS: RESPONDENTS/DEFENDANTS

1. M.V.SOMARAJ,AGED 52 YEARS,
S/O.LATE VARKEY,RESIDING AT MUNDUVELIL,
PADINJATTUMBHAGOM KARA,
ATHIRAMPUZHA VILLAGE,ATHIRAMPUZHA P.O.,
KOTTAYAM TALUK.
2. M.V.ALEY, AGED 65 YEARS,
W/O.VARKEY,PADINJATTUMBHAGOM KARA,
ATHIRAMPUZHA VILLAGE,
ATHIRAMPUZHA P.O.,
KOTTAYAM TALUK.
3. M.V.ROSE,AGED 54 YEARS,
W/O.K.N.ITYY,RENUKA BHAVAN,
KALLARA P.O.,KALLARA VILLAGE,
KOTTAYAM TALUK.

BY ADV. SRI.M.P.MADHAVAKUTTY(CAVEATOR)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 02/08/2007, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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R.S.A. NO. 534 OF 2007

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Dated this the 2nd day of August, 2007

JUDGMENT

Plaintiff in O.S.289/2002 on the file of Munsiff Court, Ettumanoor is the appellant. Defendants are the respondents. Appellant instituted the suit for a decree for a declaration of his title and possession to the plaint schedule property and for a permanent prohibitory injunction. Case of the appellant was that plaint schedule property which originally belonged to Joseph Mathew, was purchased by State Bank of Travancore in court auction sale in execution of O.S.81/1962 on the file of Sub Court, Kottayam for the amount due from Joseph Mathew and the Bank obtained delivery of the property from the receiver and subsequently Varkey, the father of the appellant and respondents 1 to 3, filed O.A.162/1972 claiming tenancy right over the property which was transferred to Land Tribunal,

Kottayam and renumbered as O.A.413/1975 and it was ultimately dismissed finding that Varkey is not entitled to purchase the jenm right. Thereafter appellant being the eldest son of Varkey negotiated to purchase the property from the decree holder auction purchaser State Bank of Travancore and accordingly bank agreed to sell the property at the value of Rs.75/- per cent on condition that name of the father also should be shown in the sale deed and therefore Ext.A2 sale deed dated 16.8.1978 was obtained in the name of Varkey also but Varkey did not derive any right or title to the property and the entire consideration for the purchase of the property was paid by the appellant and therefore appellant alone has right and title to the plaint schedule property and respondents, the other children of Varkey, are not entitled to claim right and title and therefore appellant is entitled to the declaration of his title and possession over the plaint schedule property and also for a permanent prohibitory injunction. It was also

contended that though under Ext.A11 the father has settled his rights in favour of the children in respect of his half share, under Ext.A11 respondents did not derive any right.

2. Respondents resisted the suit contending that plaint schedule property was purchased jointly by the appellant and Varkey and the appellant was brought up and educated by the father and it was considering the tenancy right of the father in the property Bank has agreed to sell the property, and appellant submitted an application before the authorities as instructed by the father and the entire sale consideration was not paid by the appellant and by both and Varkey had half right in the property and under Ext.A11 it was settled by him in favour of the respondents and appellant is therefore not entitled to the decree sought for.

3. Learned Munsiff on the evidence of Pws. 1 to 5, Dws.1 to 3 and Exts.A1 to A31 and Exts.B1 to B11 and Exts.C1 and C1(a) dismissed the suit holding that the property was jointly purchased by Varkey

and appellant and appellant has only half right in the property and remaining half share vested with Varkey which was settled under Ext.A11 and therefore appellant is not entitled to the decree sought for. The suit was dismissed. Appellant challenged the decree and judgment before District Court in A.S.19/2005. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

4. Learned counsel appearing for appellant and learned counsel who appeared for respondent on filing a caveat were heard.

5. The argument of learned counsel for appellant is that the evidence establish that Varkey had no independent income and appellant being an Executive Officer of the Panchayat was sending money for the day-to-day expense of the father and though father had claimed tenancy right in respect of the property by filing an O.A before the Land Tribunal , the O.A was dismissed and the

receiver had taken possession of the property pursuant to the court auction sale the decree holder Bank had also taken possession of the property and thereafter the property was purchased under Ext.A2. It was argued that while getting Ext.A2 sale deed, name of the father Varkey was also shown as insisted by the Bank, in view of the O.A filed by Varkey earlier though it was dismissed and the entire consideration for the purchase of the property was paid by the appellant and in such circumstance courts below should have found that the property belongs absolutely to the appellant and Varkey did not derive any right though his name was also shown in the title deed. Relying on the decision of the Apex Court in **Canbank Financial Services Ltd v. Custodian and Others (2004) 8 SCC 355**) it was argued that when a property is purchased in the name of another person, a presumption of resulting trust arises in favour of the person who is proved to have paid the

purchase money and as Ext.A3 shows that receipt for the payment of the consideration shown under Ext.A1 is in the name of the appellant, evidence should have been accepted by the courts below especially when Ext.A4 passbook shows that Rs.7500/-, the consideration, was withdrawn from that account and in such circumstance courts below should have found that Varkey did not derive any title and appellant has absolute title to the property. Learned counsel for respondents argued that courts below appreciated the evidence in the proper perspective and entered a factual finding that consideration was paid by the father also and not by the appellant alone and that factual finding cannot be interfered in exercise of the powers of this court under section 100 of the Code of Civil Procedure and even if the evidence is to be reappreciated, evidence establish that consideration was not paid by the appellant alone and in such circumstance, there is no reason to interfere with the decree and judgment passed by

the courts below.

6. Ext.A2 sale deed shows that the property was purchased by the decree holder bank in execution of the decree in O.S.81/1962 on the file of Sub Court, Kottayam, which was a suit filed against the original owner Joseph Mathew for realisation of the amount due from him. Evidence also establish that though a receiver was appointed and the decree holder had taken possession of the property, Varkey the father of appellant had filed O.A before the Land Tribunal for purchase of jenm right which was subsequently dismissed and no appeal was filed against the same. It was thereafter there was a negotiation between the Bank and Varkey and appellant, to purchase the property. It is relying on the correspondence between the Bank and the appellant it was argued that the proposal was only to purchase the property by the appellant and as insisted by the bank, in view of the claim for tenancy raised earlier by Varkey, his name was also included. Apart from

that allegation no acceptable evidence was adduced to prove that fact. None of the correspondence produced by the appellant establish such a request on the part of the Bank. Moreover, it is not known for what purpose the Bank should insist presence of the father of the appellant in the sale deed, if the bank is prepared to sell the property to appellant, especially when the O.A filed by him was dismissed by the Land Tribunal. If that be so, it could only be as one of the the assignees of the bank. Therefore there is no chance for the bank to insist that the document shall also be in the name of the father. If there was any such negotiation or request on the part of the Bank, an officer of the Bank should have been examined to prove that name of the father was shown in the document to avoid complication or as insisted by the Bank. In the absence of such evidence, it cannot be said that name of Varkey was shown in Ext.A2 as insisted by the Bank.

7. Though learned counsel relying on the

decision in **Canbank Financial Services Ltd (supra)** argued that as the consideration was paid by the appellant and the name of Varkey was also shown in the document there resulted a trust and father is only a trustee, on the facts I cannot agree with the submission. Though first appellate court relying on Ext.A4 had stated that consideration was paid by the appellant, Ext.A4 shows that Rs.7500/- was withdrawn from the bank on 12.3.1978. But Ext.A12 the first correspondence between the Bank and appellant shows that the proposal to purchase the property was decided to be discussed by the Bank only in May 1978. Therefore the consideration that is to be paid for the purchase of the property, should not have been anticipated by the appellant in March 1978. If so it is absolutely clear that the withdrawal on 12-3-1978 evidenced by Ext.A4 is not for the purpose of payment of consideration for Ext.A4. Therefore Ext.A4 does not establish that consideration for Ext.A1 was paid by the appellant.

8. Learned counsel appearing for appellant then argued that Ext.A3 receipt for the deposit of the consideration which is referred to in Ext.A2 sale deed, is in the name of the appellant and not in the name of Varkey and so it is proved that consideration was paid by the appellant and not by Varkey. Learned counsel appearing for appellant argued that the evidence establish that appellant had sent money orders evidenced by Ext.A7 series to the father and Ext.A28 shows that consideration for the purchase of that property was paid in 1968 and not on the date of execution of Ext.A28 in 1984 and therefore findings of the first appellate court that Ext.A4 establish the capacity of Varkey is not correct. True, Ext.A28 shows that though the sale deed was executed in 1984, consideration for the said sale deed was paid in 1968. As rightly found by the first appellate court appellant had no case that the consideration for Ext.A28, whether it was paid in 1968 and 1984, was by the appellant. Therefore it cannot be disputed

that at the time when the consideration was paid, father had capacity. The fact that one of the sons sent money orders to the father and it was received by the father, does not mean that father does not have any other means. When Ext.A2 establishes that consideration was paid by both the father and son, in the absence of reliable evidence to prove that consideration was paid by the appellant alone, as rightly found by the courts below, appellant is not entitled to contend that father is only a trustee and did not get any title to the property. In such circumstance, no substantial question of law is involved in the appeal. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006